



BILLING CODE: 4410-09-P

**DEPARTMENT OF JUSTICE
Drug Enforcement Administration**

**Fred J. Powell, M.D.
Decision and Order**

On January 25, 2018, the Acting Assistant Administrator, Diversion Control Division, Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause to Fred J. Powell. (hereinafter, Registrant), of St. Augustine, Florida. Order to Show Cause (hereinafter, OSC), at 1. The OSC proposes the revocation of Registrant's Certificate of Registration (hereinafter, COR) on the ground that he is without authority to handle controlled substances in Florida, the State in which he is registered with the DEA. *Id.* at 2. The OSC cites the operative statutory provisions that spell out the requirements for registration upon which the DEA alleges that Registrant is deficient, and the DEA's authority to revoke his registration. *Id.*, at 1-2 (citing 21 U.S.C. § 824(a)(3)).

Jurisdiction

This Agency has jurisdiction to decide this case based upon the OSC allegation that Registrant holds a DEA COR (No. AP8271138) at the registered address of 35 Townsend Pl., St. Augustine, FL 32092-3209. OSC, at 1. That registration authorizes Registrant, as a practitioner, to dispense controlled substances in schedules II through V and expires on March 31, 2020. *Id.*

Substantive Ground for Revocation of COR Alleged in OSC

The substantive ground for the proceeding, as alleged in the OSC, is that Registrant agreed to a permanent restriction prohibiting him from prescribing and ordering Schedule I through V controlled substances and thus is "currently without authority to handle controlled

substances in the State of Florida,” the State in which he is registered with the DEA under DEA COR No. AP8271138. OSC, at 2.

The OSC notified Registrant of his right to request a hearing on the allegations or to submit a written statement if he chooses to waive his right to a hearing, the procedures for electing each option, and the consequences for failing to elect one of those options. *Id.* (citing 21 C.F.R. § 1301.43). The OSC also notified Registrant of the opportunity to submit a corrective action plan, the specific procedures for filing a corrective action plan, and the statutory provision that governs such a plan. *Id.* at 2-3 (citing 21 U.S.C. § 824(c)(2)(C)).

By letter dated March 27, 2018, Registrant timely submitted a corrective action plan (hereinafter, CAP). Request for Final Agency Action dated April 10, 2018 (hereinafter, RFAA), Exhibit (hereinafter, Exh.) 5.¹ Registrant’s CAP consists of thirteen paragraphs containing assertions. The Assistant Administrator of the Diversion Control Division denied Registrant’s CAP by letter dated April 6, 2018. Exh. 6.

In its RFAA, the Government represents that, “At least 30 days have passed since the time the . . . [OSC] was served on Registrant. Registrant has not requested a hearing.” RFAA, at 2. The Government requests the issuance of a “Final Order revoking Registrant’s DEA registration.” *Id.* at 4.

The very existence of the CAP evidences that service of the OSC on Registrant was adequate. In addition, Registrant did not dispute service. Based on the Government’s written representations and my review of the record, I find that more than thirty days have now passed since the date the Government served the OSC. I find that Registrant timely submitted a CAP and that the Assistant Administrator of the Diversion Control Division denied Registrant’s CAP

¹ Also attached to the RFAA is a “Declaration” of a DEA Diversion Investigator (hereinafter, DI Declaration). Exh. 4. According to the DI Declaration, two Diversion Investigators personally served the OSC on Registrant on January 26, 2018.

by letter dated April 6, 2018. Further, based on the Government's written representations, I find that neither Registrant, nor anyone purporting to represent him, requested a hearing or submitted a written statement while waiving Registrant's right to a hearing. Accordingly, I find that Registrant has waived his right to a hearing and his right to submit a written statement. 21 C.F.R. § 1301.43(d). I, therefore, issue this Decision and Order based on the record submitted by the Government, which constitutes the entire record before me. 21 C.F.R. § 1301.43(e).

FINDINGS OF FACT

Registrant's DEA Registration

Registrant is the holder of DEA COR No. AP8271138, pursuant to which he is authorized to dispense controlled substances in schedules II through V as a practitioner, at the registered address of 35 Townsend Pl., St. Augustine, Florida 32092-3209. Certification of Registration History (Exh. 1), at 1.

On December 15, 2017, the State of Florida, Board of Medicine (hereinafter, Florida Board) issued a Final Order approving and adopting in full the Settlement Agreement that Registrant entered into on October 3, 2017, with the State of Florida, Department of Health. Exh. 3, at 68-70. The Florida Board's Final Order, therefore, adopted each provision of the Settlement Agreement, including Registrant's voluntary permanent restriction from "prescribing, ordering, and/or delegating the prescribing or ordering of, any substances listed in Schedules I-V, as defined in Section 893.03, Florida Statutes (2016), and may from time-to-time be redefined in Florida Statutes and/or the Florida Administrative Code." *Id.* at 63. Thus, Registrant currently lacks authority to handle controlled substances in the State of Florida, the State in which he is licensed to practice medicine and where he is registered with DEA.

DISCUSSION

Pursuant to 21 U.S.C. § 824(a)(3), the Attorney General is authorized to suspend or revoke a registration issued under section 823 of the Controlled Substances Act (hereinafter, CSA), “upon a finding that the registrant . . . has had his State license or registration suspended . . . [or] revoked . . . by competent State authority and is no longer authorized by State law to engage in the . . . dispensing of controlled substances.” With respect to a practitioner, the DEA has long held that the possession of authority to dispense controlled substances under the laws of the State in which a practitioner engages in professional practice is a fundamental condition for obtaining and maintaining a practitioner's registration. *See, e.g., James L. Hooper, M.D.*, 76 FR 71,371 (2011), *pet. for rev. denied*, 481 Fed. Appx. 826 (4th Cir. 2012); *Frederick Marsh Blanton, M.D.*, 43 FR 27,616, 27,617 (1978).

This rule derives from the text of two provisions of the CSA. First, Congress defined the term “practitioner” to mean “a physician . . . or other person licensed, registered, or otherwise permitted, by . . . the jurisdiction in which he practices . . ., to distribute, dispense, . . . [or] administer . . . a controlled substance in the course of professional practice.” 21 U.S.C. § 802(21). Second, in setting the requirements for obtaining a practitioner's registration, Congress directed that “[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.” 21 U.S.C. § 823(f). Because Congress has clearly mandated that a practitioner possess State authority in order to be deemed a practitioner under the CSA, the DEA has held repeatedly that revocation of a practitioner's registration is the appropriate sanction whenever he is no longer authorized to dispense controlled substances under the laws of the State in which he practices. *See, e.g., Hooper, supra*, 76 FR at 71,371-72; *Sheran Arden Yeates, M.D.*, 71 FR

39,130, 39,131 (2006); *Dominick A. Ricci, M.D.*, 58 FR 51,104, 51,105 (1993); *Bobby Watts, M.D.*, 53 FR 11,919, 11,920 (1988); *Blanton, supra*, 43 FR at 27,617.

Registrant has voluntarily agreed permanently to stop prescribing and ordering controlled substances, and to stop delegating the prescribing or ordering of controlled substances. Exh. 3, at 63. He has also voluntarily agreed that these permanent restrictions are “fair, appropriate and acceptable” to him.² *Id.* at 60.

The CSA has consistently been interpreted to mean that the DEA does not have statutory authority to maintain a registration if the registrant is without State authority to handle controlled substances in the State in which he practices. *E.g., Alaaeldin A. Babiker, M.D.*, 81 FR 50,723, 50,725 (2016); *Yeates, supra*, 71 FR at 39,131; *Abraham A. Chaplan, M.D.*, 57 FR 55,280, 55,280 (1992). Very simply, because Registrant is not authorized to handle controlled substances in Florida, he is not eligible for a DEA registration. As such, I will order that Registrant’s COR be revoked.

ORDER

Pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 824(a), I order that DEA Certificate of Registration No. AP8271138 issued to Fred J. Powell, M.D., be, and it hereby is, revoked. Pursuant to 28 C.F.R. § 0.100(b) and the authority vested in me by 21 U.S.C. § 823(f), I further order that any pending application of Fred J. Powell, M.D., to renew or

² Registrant also agreed to support these permanent restrictions before the Florida Board. *Id.* at 65.

modify this registration (AP8271138), as well as any other pending application by him for registration in the State of Florida, be, and it hereby is, denied. This order is effective [insert Date Thirty Days From the Date of Publication in the Federal Register].

Dated: April 23, 2019.

Uttam Dhillon,
Acting Administrator.

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